FILE COPY

Office Supreme Court, U.S.
FILED
NOV 2 1958
Clerk

Supreme Court of the United States

October Term, 1958

No. 542

ELLSWORTH MEDBERRY,
Petitioner,

vs.

WAYNE K. PATTERSON, Warden of the Colorado State Reformatory, and HARRY C. TINSLEY, Warden of the Colorado State Penitentiary,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

SAMUEL D. MENIN,
502-510 Ernest & Cranmer Bldg.,
930 Seventeenth Street,
Denver 2, Colorado,
Counsel for Petitioner.

EASTWOOD PRINTING CO. • 2854 LARIMER • DENVER 5, COLO.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reason for Granting Writ	5
Conclusion	10
Appendix A	11
Appendix B	11
Appendix C	12

TABLE OF CASES CITED

Eskridge vs. Washington State Board of Prison Terms and Paroles, 357 U. S. 214, 78 S. Ct. 1061, 2 (2d) L. Ed. 1269 9

Griffin vs. People of the State of Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R. 2d 1055 ..... 7, 8, 9

Medberry vs. People, 107 Colo. 15, 108 P. (2d) 243 ..... 6, 12

OTHER CITATIONS

Article II, Sec. 6, Colorado Constitution 8

Supreme Court of the United States

October Term, 1958

No.

ELLSWORTH MEDBERRY,
Petitioner,

vs.

WAYNE K. PATTERSON, Warden of the Colorado State Reformatory, and HARRY C. TINSLEY, Warden of the Colorado State Penitentiary,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and order of the Supreme Court of the State of Colorado denying his petition for writ of habeas corpus.

Opinion Below

The Supreme Court of the State of Colorado denied petitioner's petition for a writ of habeas corpus and the subsequent application for rehearing without written opin-

ion. The order denying petition for writ of habeas corpus[1] and motion for rehearing[2] appear in the Appendix hereto.

Jurisdiction

1. The judgment of the Supreme Court of Colorado denying petition for habeas corpus was entered on September 18, 1958.

2. Timely petition for rehearing was filed, which was denied October 14, 1958.

3. The Supreme Court of Colorado is the highest Court in Colorado and jurisdiction of this Court is invoked by reason of 28 U.S.C. § 1257 (3).

Questions Presented For Review

1. Where in a criminal proceeding a litigant of means may secure a transcript of the proceedings of the trial and thus receive an adequate appellate review, may state courts properly deny an indigent petitioner's application for a transcript of the trial proceedings at public expense and thus deny him the right to secure an adequate appellate review of his conviction.

2. May the state courts properly deny petitioner's request for the appointment of counsel, on the ground of indigency, to proceed further in the trial court and to appeal his conviction to the State Supreme Court, after his retained counsel withdrew, because there appeared in his interest an attorney from another jurisdiction under a retainer paid by petitioner's parents.

Constitutional Provisions Involved

Article XIV Constitution of the United States.

* * * No state shall make or enforce any law which shall

[1]Appendix A.
[2]Appendix B.

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was tried and convicted of murder in the District Court of Washington County, Colorado, on the 31st day of July, 1939, and sentenced to confinement for the rest of his natural life.[1] After conviction but while the case was still pending in the trial court, an attorney, John E. O'Brien of the Wisconsin Bar, was sent to Colorado in the interest of petitioner by his parents under a retainer by them.[2] Thereafter petitioner's retained counsel who represented him during the trial withdrew their appearance and on motion of the District Attorney the trial court permitted Mr. O'Brien to appear as counsel. Mr. O'Brien among other things requested the trial court, on behalf of petitioner, to appoint Colorado counsel to conduct further proceedings in the trial court and if need be in the Colorado Supreme Court, on the ground of indigency. This request for appointment of counsel was denied. Mr. O'Brien then, on behalf of petitioner, applied to the court to order the preparation of a transcript of the evidence and trial proceedings at public expense because of petitioner's indigency to enable him to procure a review of the judgment of conviction. This request was also denied.[3]

In a desperate effort to secure a transcript of the record of the proceedings, the petitioner through Mr.

---

[1]Transcript of Record Page 12

[2]Appendix C, Page 13

[3]Transcript of Record page 6. See also Appendix C, pages 13, 14

O'Brien wrote to the then Chief Justice of the Colorado Supreme Court and to the then Attorney General of Colorado for aid in securing a transcript of the proceedings of the trial,[1] and said Attorney General, answering for himself and the Chief Justice, informed petitioner that unless petitioner "or his friends can raise the requisite sum to procure a bill of exceptions (transcript of the trial proceedings) * * * he (petitioner) would seem to be precluded from appellate action."[2]

The petitioner because of his inability to provide funds was thus denied the right to an adequate appellate review based on the trial record. However, the case finally was submitted to the Colorado Supreme Court,[3] but not on any record of the trial proceedings, since the trial court refused to make same available to petitioner at public expense. The Colorado Supreme Court reviewed the case on "excerpts from the record of the case filed in the office of the clerk of the district court (pleadings) and a transcript of the various pleadings and proceedings subsequent to the appearance of Mr. O'Brien in the case, together with copies of letters passing between court and counsel and newspaper accounts of the trial."[4] The Colorado Supreme Court on such record affirmed the trial court and its decision indicated that refusal to order a transcript at public expense and refusal to appoint counsel for petitioner on the ground of indigency was a proper exercise of discretion.[5] The Supreme Court of Colorado had no opportunity to pass on the correctness of the trial proceedings. What

---

[1]Transcript of Record Paragraph 9, Page 8.

[2]Transcript of Record Page 15.

[3]Medbury v. People, 107 Colo. 15, 108 P. (2) 243, Appendix C.

[4]Appendix C page 14.

[5]Appendix C pages 23, 24.

appears to be a recitation of facts in the decision was not based on any trial record but simply a recitation of alleged "newspaper account of the trial."[1]

The petitioner, after almost 20 years of imprisonment, brought a petition for writ of habeas corpus[2] in the Colorado Supreme Court seeking redress and setting forth the denial of his rights under the due process and equal protection clauses of the United States Constitution. The verified petition pointed out that litigants with money may secure an adequate appellate review where this petitioner because of his indigency could not, nor could he hav adequate legal representation.[3] The Colorado Supreme Court without opinion denied the petition.[4] On application for rehearing,[5] the Colorado Supreme Court again without written opinion denied the relief sought.[6]

Reason For Granting Writ

In denying petitioner's application for writ of habeas corpus the Colorado Supreme Court appears to have decided an issue involving petitioner's rights under the Federal Constitution, contrary to two recent decisions of the United States Supreme Court.[7]

In the case at bar the trial court refused to order the preparation of a transcript of the record of the trial pro-

[1]Appendix C page 14.

[2]Transcrnpt of Record Pages 1 to 15 inclusive.

[3]Transcript of Record Paragraph 5, Pages 4-5.

[4]Appendix A.

[5]Transcript of Record Pages 17 to 20 inclusive.

[6]Appendix B.

[7]Griffin vs. People of the State of Illinois, 351 U.S. 12, 76 Sup Ct. 585, 100 Law Ed. 891, 55 A.L.R. 2d 1055, and Eskridge vs. Washington State Board of Prison Terms and Paroles, 357 U. S. 214, 78 S. Ct. 1061, 2 (2d) L. Ed. 1269.

ceedings at public expense on the ground of indigency[1] thus frustrating petitioner's attempt to secure an adequate appellate review by the Supreme Court of Colorado of his conviction. This refusal by the trial court and the affirmance thereof by the Colorado Supreme Court constitutes a denial to petitioner of a basic constitutional right solely because of his inability to secure the funds necessary to pay for the transcript of the trial proceedings. The case however did finally reach the Colorado Supreme Court,[2] not on the record of the trial proceedings as pointed out in the statement of the case, but on excerpts of pleadings, letters between court and counsel and newspaper articles.[3] The Colorado Supreme Court on such record was not in a position to pass upon rulings of the trial court regarding evidence and other matters which would have been disclosed by a transcript of the trial proceedings. Nevertheless the Colorado Supreme Court did not consider any basic rights of the petitioner as having been violated but merely that the trial court had properly exercised its discretion saying:

> "* * * to order a transcript of the record and testimony at the expense of the county, thereby aiding defendant (petitioner) in securing a review of the judgment of conviction on the allegation of his indigency, since, even in jurisdictions where by express statute or otherwise the power is recognized, its exercise reposes in the discretion of the court, and no abuse of such discretion in our opinion is here disclosed." (*Medberry vs. People*, 107 Colo. 15, 108 P. 2d 243.)[4]

In view of the decisions of this august tribunal the action of the trial court was not a mere discretionary matter and when the Colorado Supreme Court so held it com-

---

[1]Appendix C pages 23, 24.
[2]Medberry vs. People, 107 Colo. 15, 108 P. (2) 243 and is Appendix C hereof.
[3]Appendix C page 14.
[4]Appendix C pages 23, 24.

pounded the wrong done this petitioner. What the Colorado courts actually did, was to approve one kind of justice for those of means and another kind of justice for those without means.

This court has held in *Griffin vs. People of the State of Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R.2d 1055:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor *an adequate appellate review* accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all * * *. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." (Emphasis supplied)

It will be noted that the verified petition for habeas corpus which stands unchallenged, charges that persons who are not indigent and having sufficient funds to secure counsel at all stages of the proceedings, and who likewise can afford to pay for a transcript of the record of the proceedings of the trial, are as a matter of right under Colorado law, able to receive, and do receive, an adequate appellate review, properly represented by competent counsel pursuant to due process of law.[1] The criminal cases appearing the Colorado Reports attest thereto.

It will be noted, also, that the Chief legal officer of Colorado speaking for himself and for the Chief Justice of

---

[1]Transcript of Record, Page 5.

the Colorado Supreme Court told petitioner he "would seem to be precluded from appellate action unless he or "his friends can raise the requisite sum to procure a bill of exceptions."[1] What in effect the Attorney General was saying to petitioner is that with money he can expect to receive justice, otherwise not.

Thus it appears that in Colorado in so far as this petitioner is concerned he could not expect the equal protection of the law because he was poor when he was convicted, and when petitioner requested relief by habeas corpus the Supreme Court of Colorado without a reason therefore denied his request.

The Constitution of Colorado provides:

Article II Sec. 6

"Equality of Justice—Courts of Justice shall be open to every person, and a speedy remedy afforded for every injury to persons, property or character; *and right and justice shall be administrated without sale, denial or delay.*" (Emphasis supplied)

This Court in the Griffin case further pointed out:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice * * *. No free man shall be taken or imprisoned, or dissesied, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by lawful judgment of his peers or by the law of the land.'"

[1] Transcript of Record Page 15

And in *Eskridge vs. Washington State Board of Prison Terms and Paroles* 357 U.S. 214, 78 S. Ct, 1061, 2 (2d) L. Ed 1269, this court again sustained the right of indigent persons to equal justice and said:

> "In Griffin v. People of State of Illinois, 351 U. S. 12, 76 S. Ct. 585 100 L. Ed. 891, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here. * * * as in the Griffin case, we hold that *[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.*" (Emphasis supplied)

In the Griffin case this court also uses the language:

> "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and *the right to counsel would under such circumstances* be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color." (Emphasis supplied)

We think that the refusal to appoint counsel to proceed further in the trial court and to appeal the petitioner's conviction, thus leaving petitioner with an attorney not admitted to practice in Colorado who was without knowledge of Colorado Criminal procedure, amounted to

leaving petitioner without effective legal representation and was in effect a denial of adequate counsel.

That therefore in both respects the petitioner's rights under the due process and equal protection clauses were violated and sufficient reason exists to grant the request for certiorari herein.

Conclusion

For the reasons stated and because this petitioner has already spent almost 20 years in prison under circumstances which indicates a violation of his constitutional rights, we request this Honorable Court to grant this petition.

Respectfully submitted,

SAMUEL D. MENIN,
502-510 Ernest & Cranmer Bldg.,
930 Seventeenth Street,
Denver 2, Colorado,

Counsel for Petitioner.

Appendix A

That thereafter and on, to-wit, the eighteenth day of September, A. D. 1958, the following proceedings were had and done, to-wit:

ELLSWORTH MEDBERRY,
Petitioner,
No. 18824 vs.
WAYNE K. PATTERSON, Warden of the Colorado State Reformatory and Harry C. Tinsley, Warden of the Colorado State Penitentiary,
Respondents.

On consideration of the petition of Ellsworth Medberry for a writ of habeas corpus herein it is this day ordered that the same be, and it hereby is, denied.

Appendix B

That thereafter and on the fourteenth day of October, A. D. 1958, the following order was made and entered of record, to-wit:

ELLSWORTH MEDBERRY,
Petitioner,
No. 18824 vs.
WAYNE K. PATTERSON, Warden of the Colorado State Reformatory and Harry C. Tinsley, Warden of the Colorado State Penitentiary,
Respondents.

ORIGINAL PROCEEDING

The court having considered the motion of the petitioner for rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

Appendix C

Decided December 2, 1940.

No. 14706

ELLSWORTH MEDBERRY,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF WASHINGTON COUNTY

Hon. Arlington Taylor, Judge.

EN BANC *JUDGMENT AFFIRMED*

John E. O'Brien, for Plaintiff in Error.

Byron G. Rogers, Attorney General, Gerald E. McAuliffe, Assistant Attorney General, William B. Paynter, District Attorney, Frank D. Allen, for Defendant in Error.

Raymond L. Sauter, Amicus Curiae.

Mr. Justice Knous delivered the opinion of the Court:

Plaintiff in error, defendant below and so hereinafter designated, was charged in an information filed March 10, 1939, in the district court of Washington county, with murder in the first degree. In due course he and his family employed T. E. Munson, and Samuel Chutkow, members of the bar of the Thirteenth Judicial District of which Washington county forms a part, to represent him on the trial

on such charge, to which a plea of "not guilty" was entered. The trial opened on June 15, 1939, and was concluded on the 24th. On the latter date the jury returned its verdict finding defendant guilty of murder in the first degree and, in the exercise of its discretion to fix the penalty therefor at either death or life imprisonment, decreed the latter. Motion for new trial, based on thirty-five alleged grounds, was filed July 22, and overruled July 31, 1939, following which and upon the same date, in accordance with the verdict, judgment was pronounced, sentencing defendant to life imprisonment in the penitentiary, where he has since been incarcerated.

In October, 1939, John E. O'Brien, a member of the bar of Wisconsin, residing in Fond du Lac in that state, which also is the place of residence of the parents of defendant, and his former abode, came to Colorado in the interest of defendant, under a retainer fee paid by the parents. Thereafter on October 13, 1939, Messrs. Munson and Chutkow withdrew their appearance as attorneys for defendant and, coincidentally, upon the motion of Mr. William B. Paynter, district attorney of said judicial district, the trial court permitted Mr. O'Brien to appear as counsel in this case. On the day following, Mr. O'Brien, alleging indigency of defendant, petitioned the trial court to appoint Colorado counsel to conduct further proceedings in the district court, and, if need be, in the Supreme Court, and, in addition, presented what was designated as a supplemental motion for new trial or, in the alternative, for a writ of error coram nobis. The sequent motion was overruled and later the plea for appointment of counsel was denied by the trial court. Following these rulings defendant, through Mr. O'Brien, requested the court to order the preparation of a transcript of the evidence and proceedings in the trial court at public expense to enable defend-

ant to procure a review of the judgment of conviction. This motion also was denied. Thereafter, upon the suggestion of the indigency of defendant, we permitted him to docket his proceeding in error in this court without payment of the fee therefor and to submit the case on typewritten abstract and briefs. The writ of error was issued on December 18, 1939. Defendant's record on error consists of excerpts from the records of the case filed in the office of the clerk of the district court and a transcript of the various pleadings and proceedings subsequent to the appearance of Mr. O'Brien in the case, together with copies of letters passing between court and counsel and newspaper accounts of the trial. In view of this unusual state of the record, the attorney general moved to strike what he terms the "so-called" abstract of record and the "so-called" bill of exceptions and asked that the proceeding in error be dismissed. Notwithstanding that a record on error similar to that here presented probably never has been filed in this or any other appellate court, in consideration of defendant's vehement assertions that injustice would appear therefrom and the professed unfamiliarity of his Wisconson counsel with the practice and procedure in Colorado, we denied the motion with leave to renew the same on final argument. All briefs on the merits have been filed and the case orally argued. Upon the basis of the initial considerations above expressed, we deem it advisable to examine the errors assigned although it may be that the motions to strike and dismiss may properly have been sustained.

The principal legal controversy centers upon the refusal of the trial court to grant defendant's supplemental motion for a new trial and in denying a writ of error coram nobis sought in the alternative in the same petition and upon the same grounds. Defendant contends that the

granting of the relief sought was imperative: First, because Mr. Chutkow, one of the trial attorneys for defendant, was disqualified to act as such by reason of a conflict of interest, he being at the time of the trial the county attorney of Washington county, wherein the trial was held. Second, because upon the trial defendant suppressed certain facts constituting a defense available to him, as the result of advice by said attorney, to the effect that their disclosure might result in a verdict imposing the death penalty, and that such suppression, so arising through the alleged coercion of his said attorney, worked a fraud upon the trial court which resulted in the verdict of murder in the first degree and the judgment of conviction and sentence based thereon."

"The first contention is without semblance of merit either as a basis of error or as a ground for charging the attorney involved with a transgression of professional ethics. Under the statutes of Colorado a county attorney is employed primarily as the legal adviser of the county commissioners in whose discretion reposes the power of appointment. '35 C.S.A., c. 45, '64. In certain matters he advises other county administrative officers, appears for the county in cases involving dependent, neglected and delinquent children, in lunacy inquests and, when directed by the county commissioners, in civil litigation to which the county is a party or in which it is interested. He has no part whatsoever in the initiation or conduct of ordinary criminal proceedings which, in Colorado, are prosecuted by the district attorney in the name of the people of the state and not of the county; hence, in defending one charged with crime, at least where the county has no interest beyond that ordinarily attaining, a county attorney does not represent conflicting interests nor serve two masters. As disclosing a special financial interest in the coun-

ty, defendant argues that the inhabitants thereof were vitally concerned in the expense incident to the proceeding at bar. Such a situation is attendant in every criminal case. While we can conceive how a district attorney might justly complain if funds for a criminal prosecution were curtailed by the county commissioners upon the advice of the county attorney, we are unable to understand how the defendant in such case could reasonably assert that his rights had been prejudiced by reason of the enforced fiscal deficiencies of his adversary. It further appears that previous to the employment of Mr. Chutkow, defendant and his parents were advised and well knew that he was county attorney of Washington county, which circumstance, in the view of the trial court, was one of the factors which induced his retention as counsel for the defense. Such prior knowledge, coupled with the subsequent employment, might preclude objections from defendant on this ground in any event. See, Section 6, Colorado Canons of Ethics.

We now pass to a consideration of the second contention above specified. Technically, if the anomalous petition under examination, labelled as it is in the alternative, in reality is a supplemental motion for new trial, it may be doubted whether the trial court had jurisdiction to entertain it, since seemingly it was not filed within the time allowed therefor. See *Turley v. People*, 73 Colo. 518, 216 Pac. 536. However this may be, and without reference to the duality of title, it seems apparent that the principal purpose of the motion was to procure the issuance of a writ of error coram nobis and thus bring to the attention of the trial court an alleged error of fact because of which, defendant says, error in the challenged judgment would appear. In *Grandbouche v. People*, 104 Colo. 175, 89 P. (2d) 577, we said the writ of error coram nobis "is almost obsolete, and has been abolished by statute in some juris-

dictions. Its purpose now is attained by the filing of a motion to set aside the judgment." In *Mandell v. People*, 76 Colo. 296, 231 Pac. 199, we expressly declined to definitely decide whether, in view of our code provisions in civil actions and our statutory procedure in criminal cases, this common-law writ or a motion in the nature thereof was still available in Colorado. The opinion therein states: "Even if we should hold that such remedy exists in Colorado, * * * it would avail the defendant nothing unless his application or motion for relief states facts which bring the case within its scope." It is our conclusion that we need go no further in the case at bar. In jurisdiction where the procedure is permissible "The rule is that the extraordinary relief afforded by the proceeding in the nature of a writ coram nobis will not be granted in a criminal case after trial and conviction, except where it clearly appears that the petitioner had a valid defense in the facts of the case, but which, without negligence on his part, was not made because of duress, fraud, or excusable mistake; or that he was prevented from asserting and enjoying some legal right through duress, or fraud or excusable mistake, these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment in question." *Wheeler v. State*, 138 Ind. 687, 696, 63 N. E. 975.

In approaching the study of the question presented we deem it necessary to briefly detail the circumstances surrounding the homicide. The victim, to whom we hereinafter refer as deceased, was a salesman, thirty-two years of age, about five feet eight inches in height, who, because of his poor health, had been transferred to Colorado by his employer, a nationally known soap manufacturer. Late in the afternoon of March 10, 1939, in the course of a routine sales trip, driving an automobile provided by his em-

ployer, deceased arrived in Sedgwick, Colorado. On the outskirts of this town he "picked up" the defendant, at his solicitation, it appearing that he was "hitch-hiking" from Fond du Lac, Wisconsin, to Craig, Colorado, which is several hundred miles westerly from Sedgwick. The defendant, an unusually strong young man, at the time carried concealed in his pocket, a 25 caliber, Spanish automatic pistol. Traveling on Highway No. 6, the two drove through Sterling, and, about five o'clock p. m. stopped at Merino, some fifteen miles west of Sterling, for gasoline. From there they proceeded westerly to the junction of Highway No. 6 with Highway No. 34 at Brush, near which point the car and the two occupants were observed at about 5:45 o'clock p. m. At this junction they turned easterly toward Akron, where deceased was to make a business call. At 7:15 o'clock p. m., defendant, alone in the car and driving westwardly in the direction of Denver, stopped at Brush for gasoline, from whence he proceeded to Denver where he abandoned the car in the suburbs at about 9:30 o'clock p. m. That night, due to conduct from which their suspicions were aroused, he was apprehended by Denver police when a search of his person revealed his possession of a 25 caliber pistol. On the morning of March 13—the homicide not yet having been reported—defendant was charged with carrying concealed weapons, given a suspended sentence and ordered to leave Denver, which he did. On the same day the body of deceased was discovered in the garage of the Davis schoolhouse, about four miles west of Akron and between that city and Brush. An autopsy disclosed that death had been caused by a small caliber bullet which had entered the head behind the left ear and lodged against the frontal bone above the right eye. Decedent's left arm had been wrenched out of the socket, the left side of his body was badly bruised and

there was physical evidence that he had been struck on the head. Although the circumstances would indicate that previously he was possessed of such, no money was found on the body of deceased. After leaving Denver defendant proceeded to the western part of Colorado and then returned to Fond du Lac, Wisconsin, where he was arrested on March 18 by local officers at the request of Colorado authorities. According to their testimony he severally admitted to five peace officers in Fond du Lac, and to the sheriffs of Washington and Logan counties, Colorado, that he had shot and killed the deceased. At the trial the principal defense was that the shooting was accidental. The jury was fully instructed with respect thereto and also on the question of self-defense. Concerning the happenings immediately preceding the fatal shooting, defendant testified at the trial, in substance, that as the automobile approached the Davis school, he driving, deceased informed him that he would have to get out of the car before they reached Akron since the company rules forbade salesmen carrying "hitch-hikers" in company cars, and suggested that defendant wait at the schoolhouse for a car headed west. Defendant drove off the road to the schoolhouse, which was found to be locked. He said the two then examined the adjacent garage and, following defendant's protest at being left there, a scuffle ensued during which the deceased got hold of defendant's pistol, which was accidentally discharged, the lethal injury being thus inflicted during the struggle for possession of the weapon.

In the affidavit supporting his motion for a writ of error coram nobis, defendant asserts that in so far as it pertains to the *cause* of the struggle preceding the fatal shot his testimony at the trial was false and that in truth the contest in the garage was provoked by the renewal of a previously made indecent proposal by the deceased, con-

pled with an indecent assault there made, which facts, it is said, had they been disclosed at the trial would have resulted in a verdict other than conviction. As the purported basis of duress and fraud, defendant in his affidavit states that he informed Mr. Chutkow of such alleged circumstances and the latter advised him that the mention of such "might result in the infliction of the death penalty"; and accordingly defendant withheld the same when he testified. It is not alleged that defendant's testimony could be corroborated by any witness or circumstance. It is self-evident, as an elementary matter, that to justify granting the extraordinary relief sought, the substantive facts, upon which reliance is placed, must be true. From the circumstance that the people filed no affidavit categorically traversing that of the defendant, he assumes that the verity of its statements in this connection are conclusively established. Neither logically nor legally is such assumption warranted. In an application for a writ of error coram nobis the court is not bound to accept as true the statement of an accused in support thereof but should consider all the facts properly within the cognizance and act accordingly. *People v. Perez*, 9 Cal. App. 265, 98 Pac. 879, 16 C. J., p. 1327, §3118. "The granting of the writ is not a matter of right, but it is issued only on a showing of cause, and then it is within the discretion of the court whether, on the affidavits presented, it should be allowed." *Grandbouche v. People*, supra, quoting from 34 C. J. 399, 400, §615. If the rule was otherwise any convicted felon could assure himself of a new trial by the simple expedient of making an affidavit to the effect that some matter of defense, concerning which he alone could testify, had not been aired in the previous trial. In the instant case we are not prepared to say that the trial court abused its discretion in refusing to believe the new version of facts set out in the defendant's affidavit. If the transaction now al-

leged had in truth happened, it seems inconceivable that the defendant would not have mentioned the same to Mr. Munson, his other counsel, at one of their several private pre-trial conferences, or during the course of the trial in which Mr. Munson participated as fully as did Mr. Chutkow, yet he states in his affidavit that he did not so do. Further reasons for doubting the verity of the affidavit arise from the circumstances that following his arrest by police officers in Fond du Lac eight days after the killing, defendant stated to them, as they testified, and which testimony he did not deny, that deceased had made no indecent suggestions or proposals of any character to him and that the sole cause of the quarrel was that deceased had insisted upon defendant leaving the car. The affidavit of the sheriff of Washington county contains the statement that in his extended investigation of the case he never had received any credible information which in any way supported or tended to support the new matters asserted. We also infer from the remarks of the trial court upon the occasion of his overruling this motion, that the latest story of defendant is at variance with certain physical facts and incidents attendant upon the homicide. In the light of these patent inconsistencies and discrepancies, Mr. Chutkow, even if informed by defendant of his version of the alleged pornographic events preceding the fatal struggle, well might have doubted defendant's candor in this connection and so consistently advised as defendant alleges. Indeed, the very circumstances upon which defendant relies to corroborate his charge that Mr. Chutkow previously *knew* of defendant's contention, suggest the ephemeral character of the so-called defense. Without quoting from the communication of the latter, defendant sets out the following excerpt from a letter written by Mr. Chutkow to counsel for defendant in Wisconsin: "There is nothing

to the rumor you mention in your letter and personally I would be reluctant to have any testimony like this come in because I think it would prove a boomerang." If defendant at that time unequivocally claimed that indecent proposals had been made to him, it is difficult to understand why counsel in Wisconsin would have been writing to Mr. Chutkow about a "rumor." This letter was written more than a week before the trial commenced. Further, as appears from the affidavits of defendant's parents, they were told by Mr. Chutkow five days before the beginning of trial that as a result of his investigation he could not and would not bring up a morals charge as a defense in the case. Unless it be considered that zeal in the interest of defendant has overswayed the calm judgment of defendant's present counsel, which we prefer to believe, the unwarranted personal attack upon Mr. Chutkow, and inferentially, upon Mr. Munson and the District Attorney, contained in defendant's brief, properly might not be condoned. The district judge expressed the opinion that defendant had been unusually well represented at the trial and we have no reason to question this observation.

Except as to the cause thereof, there is little variance between the defendant's affidavit and his testimony at the trial describing the fatal encounter. Thus it would seem certain that no *new* defense—a prerequisite to the granting of the extraordinary relief sought—is proffered by the application therefor. Such is well demonstrated by the following comments of the trial court which we quote with approval: "The alleged defense now sought to be presented is in fact no different than the defense already presented, relied upon and upon which defendant was convicted, namely, the defense of accidental shooting * * * the grounds therein appear to be accidental shooting, but

brought about by a different state of facts producing a quarrel which led to an encounter. If the shooting was accidental, it was the result of an encounter brought about by a certain state of facts. The alleged new defense on which the supplemental proceedings are predicated does not change the fact that the shooting was accidental, that it was brought about as the result of a scuffle or conflict in the garage, but the defendant does allege and pretends that scuffle originated as a result of a state of facts bringing about the scuffle. No self-defense appears in the supplementary proceedings. It is still accidental shooting." For the reasons indicated we think it apparent that the trial court was well within its discretion in concluding that the defendant failed to state facts sufficient to bring his case within the scope of the remedy sought and in denying the motion under consideration.

It is the contention of defendant that the trial court erred in refusing to appoint counsel to represent him in the supplemental matters in the district court and to prosecute proceedings in error in this court. In a sense, the ruling of which complaint is made in this case, is interlocutory in character and not the subject of appellate review; but in any event no occasion arises for the determination of the extent of the power conferred upon the district court, in this connection, under section 502, chapter 48, 35 C. S. A., relating to the appointment of council for indigents, since in the case at bar defendant continuously has been represented by counsel of his own choosing from a time shortly after his arrest to the present moment. Nor it is necessary for us to deliberate hypothetically upon the inherent authority of the district court—we having no statute on the subject—to order a transcript of the record and testimony at the expense of the county.

thereby aiding defendant in securing a review of the judgment of conviction on the allegation of his indigency, since, even in jurisdictions where by express statute or otherwise the power is recognized, its exercise reposes in the discretion of the court, and no abuse of such discretion, in our opinion, is here disclosed. See Note and citations of authority, 100 A. L. R. 328.

Finally, upon the theory that the burden of proof was thereby shifted to defendant, it is asserted that the court erred in giving Instruction No. 8. Technically our critical study of this assignment of error is precluded by the circumstance that no bill of exceptions covering the trial proper has been filed. See, *Pettit v. People*, 24 Colo. 517, 52 Pac. 676; *La Plant v. Axelson*, 72 Colo. 95, 209 Pac. 637. However, in *Babcock v. People*, 13 Colo. 515, 22 Pac. 817, where, as here, the jury was instructed on self-defense, the giving of the same instruction, which is a precise copy of Section 50, Chapter 48, '35 C. S. A., was declared not to be error. See, also, *Kent v. People*, 8 Colo. 563, 9 Pac. 852, and *Prince v. United States*, 3 Okla. Cr. 700, 109 Pac. 241.

The judgment herein presented for review is affirmed.

Mr. Justice Bakke, Mr. Justice Otto Bock and Mr. Justice Burke concurr; Mr. Justice Francis E. Bouck dissents; Mr. Chief Justice Hilliard and Mr. Justice Young not participating.